118-375

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 1246.

THE UNITED STATES, PLAINTIFF,

vs.

KAGAMA, ALIAS "PACTAH BILLY," AN INDIAN, AND MAHAWAHA, ALIAS "BEN," AN INDIAN.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

FILED JANUARY 5, 1886.

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1 *Certificate of division of opinion.*

At a stated term, to wit, the November term, A. D. 1885, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the district of California, held at the court-room in the city and county of San Francisco, on the 30th day of November, A. D. 1885.

Present, the honorable Lorenzo Sawyer, circuit judge; the honorable George M. Sabin, U. S. district judge of Nevada.

THE UNITED STATES OF AMERICA
vs.
KAGAMA, ALIAS "PACTAH BILLY," AN INDIAN, and Mahawaha, alias "Ben," an Indian.

The record upon which this matter was heard is as follows:

An indictment for the crime of murder, found in the district court of the United States for the district of California, certified to this court
2 for trial by an order of said district court, which certificate, order, and indictment are in the words and figures following, to wit:

In the district court of the United States for the district of California.

THE UNITED STATES OF AMERICA
vs.
KAGAMA, ALIAS "PACTAH BILLY," AN INDIAN, and Mahawaha, alias "Ben," an Indian.

Certificate, &c.

I, Southard Hoffman, clerk of the district court of the United States for the district of California, do hereby certify that on motion of Henry C. Dibble, esq'r, assistant United States attorney for said district, made on Friday, October 2d, A. D. 1885, in open court, at a stated term of said United States district court, to wit, the August term thereof, it was by the said court ordered that the indictment found against the defendants above named be remitted to the next term of the circuit court of the
3 United States for the ninth circuit and district of California, for trial.

And in pursuance of said order, I do hereby certify the annexed indictment to be the original indictment found against Kagama, alias "Pactah Billy," an Indian, and Mahawaha, alias "Ben," an Indian, the defendants above named, and do hereby remit the same to the said circuit court of the United States for the ninth circuit and district of California.

In witness whereof I hereunto set my hand and affix the seal of said district court this third day of September, A. D. 1885.

[SEAL.] SOUTHARD HOFFMAN,
Clerk,
By A. D. GREENWOOD,
Deputy Clerk.

4 *Certificate, &c.*

[Sec. 9, act of Congress, March 3d, 1885, Statutes at Large, 2d sess., 1884–'85, p. 385, sec. 5339, U. S. R. S.]

UNITED STATES OF AMERICA:

District court of the United States for the district of California.

At a stated term of the said court begun and holden at the city and county of San Francisco, within and for the district of California, on the second Monday of August, in the year of our Lord one thousand eight hundred and eighty-five, the grand jurors of the United States of America, within and for the district aforesaid, on their oath, present that Kagama, alias "Pactah Billy," an Indian, and Mahawaha, alias "Ben," an Indian, late of the district of California, heretofore, to wit, on the twenty-fourth day of June, in the year of our Lord one thousand eight hundred and eighty-five, not having the fear of God before their eyes, but being moved and seduced by the instigation of the devil, with force and arms, at the county of Humboldt, in the State of California, district of California, within the limits of the Hoopa Valley Indian
5 Reservation, within the jurisdiction of the circuit court of the United States, ninth circuit, district of California, and within the territorial jurisdiction of the district court of the United States for the district of California, in and upon one Iyousè, alias "Ike," an Indian, then and there being, feloniously, willfully, and of malice aforethought did make an assault, and that he, the said Kagama, alias "Pactah Billy," an Indian, with a certain knife made of iron and steel, which he, the said Kagama, alias "Pactah Billy," an Indian, in his right hand then and there had, and held, the throat of him, the said Iyouse, alias "Ike," an Indian, feloniously, willfully, and of his malice aforethought, did strike, stab, and cut, and that he, the said Kagama, alias "Pactah Billy," an Indian, with the knife aforesaid, by the striking, stabbing, and cutting aforesaid, did then and there give to him, the said Iyouse, alias "Ike," an Indian, in and upon the said throat of him, the said Iyouse, alias "Ike," an Indian, one
6 mortal wound of the length of two inches, and of the depth of three inches, of which said mortal wound the said Iyonse, alias "Ike," an Indian, did then and there at once die.

And that the aforesaid Mahawaha, alias "Ben," an Indian, then and there feloniously, willfully, and of his malice aforethought was present, aiding, helping, abetting, and assisting the said Kagama, alias "Pactah Billy," an Indian, the felony and murder aforesaid, in manner and form aforesaid, to do and commit. And so the jurors, aforesaid, upon their oaths aforesaid, do say that the said Kagama, alias "Pactah Billy," an Indian, and the said Mahawaha, alias "Ben," an Indian, the said Iyouse, alias "Ike," an Indian, then and there in manner and form aforesaid, feloniously, willfully, and of their malice aforethought, did kill and murder.

Against the peace and dignity of the United States of America, and contrary to the form of the statutes of the United States in such case made and provided.

7 SECOND COUNT.

Certificate, &c.

[Sec. 9, act Congress, March 3d, 1885, Statutes at Large, 2d sess., '84–'85, p. 385, sec. 5339, U. S. R. S.]

And the grand jurors aforesaid, on their oaths aforesaid, do further present, that said Kagama, alias "Pactah Billy," an Indian, and the said Mahawaha, alias "Ben," an Indian, late of the district of California, heretofore, to wit, on the twenty-fourth day of June, in the year of our Lord one thousand eight hundred and eighty-five, not having the fear of God before their eyes, but being moved and seduced by the instigation of the devil, with force and arms, at the county of Humboldt, in the State of California, district of California, within the limits of the Hoopa Valley Indian Reservation, within the jurisdiction of the circuit court of the United States, ninth circuit, district of California, and within the territorial jurisdiction of the district court of the United States for the district of California, in and upon one Iyouse, alias "Ike," an Indian, then and there being, feloniously, willfully, and of malice aforethought, did make
8 an assault, and that he, the said Kagama, alias "Pactah Billy," an Indian, with a certain knife, which he, the said Kagama, alias "Pactah Billy," an Indian, then and there held, the breast of him, the said Iyouse, alias "Ike," an Indian, feloniously, willfully, and of his malice aforethought, did strike, stab, and cut; and that he, the said Kagama, alias "Pactah Billy," an Indian, with the knife aforesaid, by the striking, stabbing, and cutting aforesaid, did then and there give him, the said Iyouse, alias "Ike," an Indian, in and upon the said breast of him, the said Iyouse, alias "Ike," an Indian, one mortal wound of which said mortal wound the said Iyouse, alias "Ike," an Indian, did then and there at once die.

And that the aforesaid Mahawaha, alias "Ben," an Indian, then and there feloniously, willfully, and of his malice aforethought, was present, aiding, advising, comforting, helping, abetting, and assisting the said Kagama, alias "Pactah Billy," an Indian, the felony and murder
9 aforesaid, in manner and form aforesaid, to do and commit.

And so the grand jurors aforesaid, on their oaths aforesaid, do say that the said Kagama, alias "Pactah Billy," an Indian, and the said Mahawaha, alias "Ben," an Indian, the said Iyouse, alias "Ike," an Indian, then and there, in manner and form aforesaid, feloniously, wilfully, and of their malice aforethought did kill and murder, against the peace and dignity of the United States of America, and contrary to the form of the statutes of the United States in such case made and provided.

S. G. HILBORN,
United States Attorney,
By HENRY C. DIBBLE,
Asst. U. S. Att'y.

Names of witnesses examined before the said grand jury on finding the foregoing indictment: Charles Porter, Robert J. Walker, Mary Janealias "Martie," an Indian woman, Harry, alias "Charlie," an Indian boy.

10 [Endorsed.]

No. 2096 U. S. circuit court, dist. of Cal.
No. 2034, United States district court, district of California.
The United States of America vs. Kagama, alias "Pactah Billy," an Indian, and Mahawaha, alias "Ben," an Indian.
Indictment for the murder of Iyouse, alias "Ike," an Indian, within the limits of the Hoopa Valley Indian Reservation.

A true bill.

GEO. H. WHEATON,
Foreman.

Presented and filed in open court this 2d day of October, A. D. 1885.
SOUTHARD HOFFMAN,
Clerk,
By A. D. GREENWOOD,
Deputy Clerk.
SAMUEL G. HILBORN,
United States Attorney.

In U. S. circuit court. Filed October 3d, 1885.
L. S. B. SAWYER,
Clerk U. S. Circuit Court, Dist. of Cal.

11 The demurrer to said indictment filed by the defendants therein, which demurrer is in the words and figures following, to wit:

United States circuit court, ninth circuit, district of California.

THE UNITED STATES OF AMERICA
vs.
KAGAMA, ALIAS "PACTAH BILLY," AN INDIAN, and Mahawaha, alias "Ben," an Indian.

Certificate.

Now come the above-named defendants in open court, and having heard the said indictment read, saith that the said the United States of America ought not further to impeach or prosecute them, the said defendants, touching the premises whereof they are by the said indictment accused, because they say that the said indictment and the matters therein contained,
12 are not sufficient in law to compel them, the said defendants, to answer the same, that no process upon the said indictment ought, by the law of the land, to be issued against them, the said defendants, and this they are ready to verify.

And the defendants further saith that this honorable circuit court hath no jurisdiction of themselves in matters of this kind, and that said honor-

able court is without jurisdictional authority to proceed against the said defendants.

Wherefore they pray judgment of the court here, and that they may be dismissed & discharged of the said indictment.

JOSEPH D. REDDING,
Att'y for Def'ts.

(Endorsed:) No. 2096. U. S. circuit court, ninth circuit, district of California. The United States of America vs. Kagama, alias "Pactah Billy," an Indian, and Mahawaha, alias "Ben," an Indian.

13 *Demurrer.—Filed October* 26, 1885.—*L. S. B. Sawyer, clerk.*

Certificate, &c.

The said certificate, order, indictment, and demurrer are hereby made a part of this certificate, and ordered to be certified by the clerk, and annexed to this certificate as a part of the record of this case, on certificate of opposition of opinion.

The case was heard on the indictment, and the demurrer thereto, and upon the hearing of said case at the present term of the court, upon said papers and record there occurred as questions arising on the record:

1. Whether it is within the constitutional power of Congress to pass section 9 of the act of Congress, approved March 3, 1885, entitled "An act making appropriations for the current and contingent expenses
14 of the Indian Department and for fulfilling treaty stipulations with the various Indian tribes, for the year ending June thirtieth, eighteen hundred and eighty-six, and for other purposes" found in statutes, second session, 1884–'5, page 385, providing that "after the passage of this act all Indians committing against the person of another Indian the crime of 'murder,' within the boundaries of any State of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts, and in the same manner, and subject to the same penalties as are all other persons committing the crime of murder within the exclusive jurisdiction of the United States.'"

2. Whether said section 9, so far as it makes crimes committed by one Indian upon another Indian, upon and within an Indian reservation situate wholly within the boundaries of a State of the Union, an
15 offense against the laws of the United States, triable and punishable in and by the courts of the United States, is constitutional or is within the constitutional power of Congress to pass.

3. Whether the provisions of said section 9, so making it a crime for one Indian to commit murder upon another Indian upon an Indian reservation situated wholly within the limits of a State of the Union, and making such Indian so committing the crime of murder within and upon such Indian reservation "subject to the same laws" and subject to be "tried in the same courts, and in the same manner, and subject to the same penalties as are all other persons" committing the crime of murder "within the exclusive jurisdiction of the United States," is a constitutional and valid law of the United States?

4. Whether the facts alleged and charged in the indictment set
16 out in the record constitute a crime or offense against or under any valid act of Congress or law of the United States?

5. Whether the circuit court of the United States has authority or jurisdiction to try the offense or crime charged in the indictment, and upon conviction to adjudge against, and inflict upon, the defendants the penalties provided for in said section 9 of said act, or any other statute of the United States?

6. Whether the courts of the United States have jurisdiction or authority to try and punish an Indian belonging to an Indian tribe for committing the crime of murder upon another Indian belonging to the same Indian tribe, both sustaining the usual tribal relations, said crime having been committed upon an Indian reservation made and set apart for the
17 use of the Indian tribe to which said Indians both belong?

Upon which said several questions, and upon each of them, the opinions of the judges were opposed.

Wherefore, on the motion of Henry C. Dibble, esq., assistant United States attorney for said district on behalf of the United States, that the several points upon which the disagreement has happened, may during the term be stated, under the direction of the judges, and certified, under the seal of the court, to the Supreme Court of the United States to be finally decided:

It is ordered that the foregoing statement of the record and facts upon which the case was heard, and of the points of difference as to the law arising thereon, which is made under the direction of the judges, be entered of record and be certified accordingly, at the request of said counsel
18 and in pursuance of the law in such case made and provided.

(Signed) LORENZO SAWYER,
Circuit Judge.

(Signed) GEORGE M. SABIN,
Dist. Judge.

(Endorsed:) Filed and entered December 10, 1885. L. S. B. Sawyer, clerk.

Certificate, &c.

I, L. S. B. Sawyer, clerk of the circuit court of the United States for the district of California, do hereby certify the foregoing to be a full, true, and correct copy of the certificate of division of opinion in the therein entitled cause now on file and of record in my office.

Attest my hand and the seal of said circuit court this fifteenth day of December, A. D. 1885.

[SEAL.] L. S. B. SAWYER,
Clerk.

(Indorsed on cover:) No. 1246. The United States, plaintiff, vs. Kagama, alias "Pactah Billy," an Indian, and Mahawaha, alias "Ben," an Indian. California C. C. U. S. Filed January 5, 1886.

O

4. Whether the facts alleged and charged in the indictment set
16 out in the record constitute a crime or offense against or under any valid act of Congress or law of the United States?

5. Whether the circuit court of the United States has authority or jurisdiction to try the offense or crime charged in the indictment, and upon conviction to adjudge against, and inflict upon, the defendants the penalties provided for in said section 9 of said act, or any other statute of the United States?

6. Whether the courts of the United States have jurisdiction or authority to try and punish an Indian belonging to an Indian tribe for committing the crime of murder upon another Indian belonging to the same Indian tribe, both sustaining the usual tribal relations, said crime having been committed upon an Indian reservation made and set apart for the
17 use of the Indian tribe to which said Indians both belong?

Upon which said several questions, and upon each of them, the opinions of the judges were opposed.

Wherefore, on the motion of Henry C. Dibble, esq., assistant United States attorney for said district on behalf of the United States, that the several points upon which the disagreement has happened, may during the term be stated, under the direction of the judges, and certified, under the seal of the court, to the Supreme Court of the United States to be finally decided:

It is ordered that the foregoing statement of the record and facts upon which the case was heard, and of the points of difference as to the law arising thereon, which is made under the direction of the judges, be entered of record and be certified accordingly, at the request of said counsel
18 and in pursuance of the law in such case made and provided.

(Signed) LORENZO SAWYER,
Circuit Judge.

(Signed) GEORGE M. SABIN,
Dist. Judge.

(Endorsed:) Filed and entered December 10, 1885. L. S. B. Sawyer, clerk.

Certificate, &c.

I, L. S. B. Sawyer, clerk of the circuit court of the United States for the district of California, do hereby certify the foregoing to be a full, true, and correct copy of the certificate of division of opinion in the therein entitled cause now on file and of record in my office.

Attest my hand and the seal of said circuit court this fifteenth day of December, A. D. 1885.

[SEAL.] L. S. B. SAWYER,
Clerk.

(Indorsed on cover:) No. 1246. The United States, plaintiff, vs. Kagama, alias "Pactah Billy," an Indian, and Mahawaha, alias "Ben," an Indian. California C. C. U. S. Filed January 5, 1886.

118-375

Office Supreme Court U. S.
FILED
FEB 25 1886
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1885.

THE UNITED STATES, PLAINTIFF,
vs.
KAGAMA, ALIAS "PACTAH BILLY," AN Indian, and Mahawaha, alias "Ben," an Indian. } No. 1246.

ON A CERTIFICATE OF DIVISION OF OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1885.

THE UNITED STATES, PLAINTIFF,
vs.
KAGAMA, ALIAS "PACTAH BILLY," AN INDIAN, AND MAHAWAHA, ALIAS "BEN," AN INDIAN. } No. 1246.

ON A CERTIFICATE OF DIVISION OF OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

BRIEF FOR THE UNITED STATES.

Statement of the case.

At a stated term of the district court of the United States for the district of California, at the city of San Francisco, on the second Monday of August, 1885, the defendants were indicted by the grand jurors of the United States of America for the felonious, willful, and malicious murder of one Iyouse, alias "Ike," an Indian, at the county of Humboldt, in the State of California, within the limits of the Hoopa Valley Indian Reservation, and within the jurisdiction of the circuit court of the United States for the

district of California, and within the territorial jurisdiction of the district court of the United States for the district of California.

The indictment was certified to the circuit court of the United States for the district of California for trial. On the 26th day of October, 1885, the defendants filed a demurrer to the indictment. The case being heard on the demurrer to the indictment, the opinions of the judges were opposed upon the following questions arising on the record:

1. Whether it is within the constitutional power of Congress to pass section 9 of the act of Congress approved March 3, 1885, entitled "An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with the various Indian tribes, for the year ending June 30, 1886, and for other purposes," found in statutes, second session, 1884–'85, page 385, providing that "after the passage of this act all Indians committing against the person of another Indian the crime of 'murder,' within the boundaries of any State of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts, and in the same manner, and subject to the same penalties as are all other persons committing the crime of murder within the exclusive jurisdiction of the United States."

2. Whether said section 9, so far as it makes crimes committed by one Indian upon another Indian, upon and within an Indian reservation situate wholly within the boundaries of a State of the Union, an offense against the laws of the United States, triable and punishable in and by the courts of the United States, is constitutional or is within the constitutional power of Congress to pass.

3. Whether the provisions of said section 9, so making it a crime for one Indian to commit murder upon another Indian upon an Indian reservation situated wholly within the limits of a State of the Union, and making such Indian so committing the crime of murder within and upon such Indian reservation "subject to the same laws" and subject to be "tried in the same courts, and in the same manner, and subject to the same penalties as are all other persons" committing the crime of murder "within the exclusive jurisdiction of the United States," is a constitutional and valid law of the United States.

4. Whether the facts alleged and charged in the indictment set out in the record constitute a crime or offense against or under any valid act of Congress or law of the United States.

5. Whether the circuit court of the United States has authority or jurisdiction to try the offense or crime charged in the indictment, and upon conviction to adjudge against and inflict upon the defendants the penalties provided for in said section 9 of said act, or any other statute of the United States.

6. Whether the courts of the United States have jurisdiction or authority to try and punish an Indian belonging to an Indian tribe for committing the crime of murder upon another Indian belonging to the same Indian tribe, both sustaining the usual tribal relations, said crime having been committed upon an Indian reservation made and set apart for the use of the Indian tribe to which said Indians both belong.

The question presented by the certificate of division involves the constitutionality of the ninth section of an "Act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the year end-

ing June 30, 1886, and for other purposes," which is set forth in the first question already stated (Rec., p. 5).

The question raised is one of magnitude and importance. It is a very serious matter to call upon the courts to declare an act of Congress unconstitutional and void. The doctrine is a familiar one here, that this court will always presume an act of Congress to be constitutional, and will never hold it to be unconstitutional and void unless it is plainly antagonistic to the organic law of the land. In the case of the *United States* vs. *Harris* (106 U. S. Rep., p. 635) Mr. Justice Woods, in delivering the opinion of the court, said:

> Proper respect for a co-ordinate branch of the Government requires the courts of the United States to give effect to the presumption that Congress will pass no act not within its constitutional power. This presumption should prevail unless the lack of constitutional authority to pass an act in question is clearly demonstrated.

Before the adoption of the Constitution, the Articles of Confederation gave to the United States in Congress assembled the sole and exclusive right of—

> Regulating the trade and managing of affairs with Indians not members of any of the States; provided that the legislative power of any State, within its own limits, be not infringed or violated. The ambiguous phrases which follow the granting of power to the United States were so construed by the States of North Carolina and Georgia as to annul the power itself. The discontent and confusion resulting from these conflicting claims produced representations to Congress, which were referred to a committee, who made their report in 1787. The report does not as-

> sent to the construction of the two States, but recommends accommodation by liberal concessions, and by a diminution on their part of the powers claimed by Congress. The correct exposition of this article is rendered unnecessary by the adoption of the existing Constitution. That instrument confers on Congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several States and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians. (Worcester *vs.* State of Georgia, 6 Peters, p. 214.)

Section 8 of article 1 of the Constitution provides that—

> Congress shall have power to regulate commerce with foreign nations, and among the several States and with the Indian tribes.

It also provides that—

> Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or officer thereof.

What is the meaning of the word "commerce" as used in the Constitution? It has been sometimes contended that it is limited to traffic, to buying and selling, or the interchange of commodities; but turning to the celebrated case of Gibbons *vs.* Ogden (9 Wheaton), which is recognized as the leading case upon this clause of the Constitution, we find that Chief Justice Marshall uses the following language: "Commerce undoubtedly is traffic, but it is something more; it is intercourse." This definition has been universally accepted as the true one, and in several

subsequent decisions by this court we find that the words "commerce" and "intercourse" are treated as synonymous.

Ever since the adoption of the Constitution in 1789 Congress has exercised the power of regulating the intercourse with Indians, and of enacting criminal laws with regard to the conduct of Indians and the conduct of white men having intercourse with Indians in the Indian country and the reservations within the States. It may be profitable, perhaps, in this discussion, to trace briefly the history of the Indian intercourse laws which have been adopted since the organization of the Government. The first Congress which met under the Constitution passed an act regulating trade and intercourse with the Indian tribes. This act was approved July 22, 1790, and is found on page 137, vol. 1, Statutes at Large. It provided for granting licenses to trade with the Indians, for the sale of lands by the Indians in certain cases, and for the punishment of offenses committed by citizens within the Indian territory. So that we see at the beginning of the Government, Congress exercised the power of enacting criminal legislation under the clause of the Constitution relating to the regulation of commerce with the Indian tribes.

The act referred to was limited to two years, but it was re-enacted in 1793. That act, approved March, 1793 (found in the same volume, page 329), was also limited to two years. It provides for the punishment of certain offenses committed against the Indians, and invests the courts of the United States with jurisdiction to try such offenses. The next act to regulate trade and intercourse with the Indian tribes was approved May 9, 1796, and is

found in the same volume, page 469. It seems that Congress was unwilling to enact a permanent law, so as to preserve for any considerable time the line of demarkation between the Indians and the white people. Accordingly, the last act referred to expired by limitation in two years, but it was re-enacted March 3, 1799. This act (to be found in the same volume, page 743) is more comprehensive than the three which preceded it. The object of its provisions seems to have been to protect the Indians from depredations committed upon them by the whites. This act was limited to three years.

The next intercourse act was approved March 30, 1802, and will be found in volume 2 of the Statutes at Large, page 139. It contains an important provision showing that it was not the intention of Congress to leave Indians to be punished entirely by the tribes to which they belonged. Section 14 provides that the President may demand reparation of the tribe for offenses committed by Indians, but it provides also that "nothing therein contained shall prevent the legal apprehension or arrest, within the limits of any State or district, of any Indian having so offended." Section 15 invests the courts of the United States with jurisdiction to punish for offenses that may be committed against the provisions of the act.

It will be observed that the act of 1802 contains the first provision for the arrest and punishment of Indians. As the United States have grown in territory and population the policy of the Government in its intercourse with the Indian tribes has been materially changed, and to-day the situation is very different from what it was when the constitutional provision now under consideration was

adopted. The act of 1802 remained in force until 1834, but in the mean time an act was passed in 1817 which was not unlike that now in question. It may be found in volume 3, Statutes at Large, page 383, and is as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That if any Indian, or other person or persons, shall, within the United States, and within any town, district, or territory belonging to any nation or nations, tribe or tribes of Indians, commit any crime, offense, or misdemeanor, which, if committed in any place or district of country under the sole and exclusive jurisdiction of the United States would, by the laws of the United States, be punished with death, or any other punishment, every such offender on being thereof convicted shall suffer the like punishment as is provided by the laws of the United States for the like offenses, if committed within any place or district of country under the sole and exclusive jurisdiction of the United States.
>
> SEC. 2. *And be it further enacted,* That the superior courts in each of the territorial districts, and the circuit courts and other courts of the United States, of similar jurisdiction in criminal causes, in each district of the United States in which any offender against this act shall be first apprehended or brought for trial, shall have, and are hereby invested with, full power and authority to hear, try, and punish all crimes, offenses, and misdemeanors against this act; such courts proceeding therein in the same manner as if such crimes, offenses, and misdemeanors had been committed within the bounds of their respective districts: *Provided,* That nothing in this act shall be so construed as to affect any treaty now

in force between the United States and any Indian nation, or to extend to any offense committed by one Indian against another within any Indian boundary.

This was the first law enacted by Congress which provided for the punishment of offenses committed upon white persons in the Indian country. But it seems to have been the policy of the Government at that time to relegate to the Indian tribes, in their tribal organizations, the power and authority to punish offenses committed upon each other. At that day it would have been vain for Congress to enact laws for the punishment of crimes committed by Indians upon each other. But, with the growth of the country and the changed relations between the Government and the Indians, another condition of affairs was presented, and other legislation became necessary. In 1830 Congress passed an act (vol. 4, Stat. L., p. 411) authorizing the President to exchange lands with organized Indian tribes or nations. Under that act the Indians east of the Mississippi River were removed and settled on the west side of that river, in the region now known as the Indian Territory.

The next intercourse act was approved June 30, 1834 (vol. 4, Stat. L., p. 479), and was continued in existence until the Revised Statutes were adopted. By the twenty-ninth section of that act, the act of 1817, to which reference has been made, was repealed. So that, after the year 1834, until the enactment of the Revised Statutes, the act found in volume 4 of the Statutes at Large was the law regulating intercourse with the Indian tribes. The act of 1834 established what is known as the "Indian country." The nineteenth section of that act provided

for the punishment of certain offenses, thus showing that Congress has at all times exercised the power of enacting criminal laws for the Indian country, whether committed by Indians or whites, except in the case where the crime was committed by one Indian upon another. The reason of that exception evidently was that it would have been impossible to enforce such a provision at that time.

The first section of the act of 1834, establishing the Indian country, was repealed by the Revised Statutes, and in legal contemplation there is now no "Indian country" except those reservations which still remain within the limits of the States or the organized Territories of the United States. According to the decisions of the courts, the provisions of the Revised Statutes under the title "Indians," do not apply to the Indian Territory, but only to the reservations within the States and the organized Territories of the United States. There were various acts amending the Indian intercourse laws passed prior to the revision of the statutes in 1870, but they are all, together with the main provisions of the act of 1834, contained in the Revised Statutes under the title "XXVIII, Indians." It will be seen that section 2079 of the Revised Statutes, which was first enacted March 3, 1871, effects a revolution in the policy of the Government respecting Indian affairs. It provides that—

> No Indian nation or tribe, within the territory of the United States, shall be acknowledged or recognized as an independent nation, tribe, or power, with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired.

It thus appears that from March 3, 1871, the Government of the United States ceased to recognize these tribes of Indians as Indian nations with whom it might make treaties. The effect of that section is to declare that the Klamath Indians do not belong to an independent nation or tribe—such a nation or tribe as was described by Chief-Justice Marshall in the Cherokee case. The Indian tribes have receded before the progress of the white man's civilization. While it is the purpose of the Government to protect the Indians in their rights, it is no less its policy to subject them to the laws and make them responsible for crimes committed by them. The attention of the court is invited to sections 2139, 2140, 2141, 2145, and 2146 of the Revised Statutes.

The question as to what is the "Indian country" has been considered and decided by the courts. In the case of *United States* vs. *Leathers* (6 Sawyer, 17) it was held that the Indian country is now to be considered that portion of the United States which is occupied by Indians upon reservations. This decision has been followed in several cases. (See *United States* vs. *Bridleman*, 7 Sawyer, 243; *United States* vs. *Martin*, 8 Sawyer, 473.)

In the latter case it was held by Judge Deady that—

> Since the repeal of section 1 of the Indian intercourse act of 1834 by section 5596 of the Revised Statutes, the only Indian country in the United States within the purview of that phrase, as used in chapter 4, Title XXVIII of the Revised Statutes, are the tracts of land set apart by the authority of the United States for the exclusive use and occupancy of particular Indians, and known as Indian reservations. (See also *United States* vs. *Shawmunx*, 2

Sawyer, 364; *ex parte* Sloan, 4 Sawyer, 320; *United States* vs. *Osborne*, 6 Sawyer, 406; *United States* vs. *Yellow Sun*, 1 Dillon, 273.)

These cases decided that, by the effect of the laws referred to, the only Indian country remaining is comprised within those reservations which have been established either by treaty, or by action of the Executive, under the power conferred by Congress upon the Executive to establish reservations; that the Indian Territory, which has an organized government by Indians is not the Indian country; that the act we are now considering has no application to the Indian Territory, and only applies to the Indian reservations still existing within the boundaries of the States or within the organized Territories of the United States.

The power of Congress to pass all laws that may be considered necessary for the regulation of intercourse with the Indians, and for the punishment of offenses committed on Indian reservations by Indians or whites, has been recognized from the foundation of the Government. The case of *The United States* vs. *Bailey* (1 McLean's Reps., 234) is an exception possibly, and so is *United States* vs. *Doxtater* (47 Wis., 278), and *Yellow Sun's Case* (*supra*) questions it, but the weight of authority is decidedly the other way. The subject was ably and elaborately discussed early in the history of the United States.

The leading case upon the subject of the relations of the Indians to the Government is that of the *Cherokee Nation* vs. *The State of Georgia* (5 Peters, p. 1). In that case this court held that the Indian tribes were subject nations; that the Cherokees had no standing in this court,

and could not maintain an action against the State of Georgia. This decision was rendered in 1831, at a time when the Indian tribes were still powerful, and when the Cherokees that now occupy the Indian Territory and maintain therein political governments, republican in form, were inhabiting a portion of the State of Georgia. Another leading case is that of *Worcester* vs. *The State of Georgia* (6 Peters, 315), in which it was held that the State of Georgia had no jurisdiction over the region occupied by the Cherokee Nation. (See also *Johnson* vs. *McIntosh*, 8 Wheat. 543; *Markey* vs. *Coxe*, 18 How., 100; *Jackson* vs. *Goodell*, 20 Johns., 188.)

In *United States* vs. *Holliday* (3 Wallace, 407) this court sustained the constitutionality of an act of Congress making it penal to sell spirituous liquor to an Indian under charge of an Indian agent, although it was sold outside of an Indian reservation and within the limits of a State. Mr. Justice Miller, in delivering the opinion of the court in that case, said:

> If commerce, or traffic, or intercourse is carried on with an Indian tribe, or with a member of such tribe, it is subject to be regulated by Congress, although within the limits of a State. The locality of the traffic can have nothing to do with the power. The right to exercise it in reference to any Indian tribe, or any person who is a member of such tribe, is absolute, without reference to the locality of the traffic, or the locality of the tribe, or the member of the tribe with whom it is carried on.

In *United States* vs. *Forty-three gallons of Whisky* (93 U. S., 188) it was held that:

> Congress, under its constitutional power to regu-

late commerce with the Indian tribes, may not only prohibit the unlicensed introduction and sale of spirituous liquors in the Indian country, but extend such prohibition to territory in proximity to that occupied by Indians.

From a review of all the decisions of this court upon the subject, the doctrine seems to have been settled that there is no limitation upon the power of Congress to enact whatever laws may be necessary to regulate the affairs of the Indian tribes; that the power of regulating commerce with Indian tribes is, in its nature, general, and not confined to any locality; that its existence necessarily implies the right to exercise it whenever there is a subject to act upon, although within the limits of a State, and that it extends to the regulation of intercourse with the individual members of such tribes.

There is nothing in the decision of *Ex parte* Crow Dog (reported in 109 U. S., 556), which conflicts with the doctrine as we have stated it. That decision goes particularly to the construction of the treaties existing between the United States and the tribe of Sioux Indians to which Crow Dog belonged. He was chief of the tribe, and had murdered, as it was charged, another Indian. He was indicted and convicted in the territorial court of Dakota for the murder. The authority under which it was claimed the court tried him for the offense was the general provision of the Revised Statutes in section 2145, extending the criminal laws of the United States over the Indian country. But this court held that section 2146, which provides that the law shall not extend to the punishment of an Indian who commits a crime upon another Indian, was imperative, and the prisoner was discharged.

Undoubtedly, the decision of the court in that case was correct, because at that time there was no authority vested in the Territorial court to try the prisoner for the crime of murder committed upon another Indian; but there is nothing in that decision which calls in question the power of Congress to repeal the proviso contained in section 2146. There is nothing in it which suggests the unconstitutionality of the section now under consideration, which Congress soon afterwards passed. In concluding his opinion in that case Mr. Justice Matthews said:

> To give to the clauses in the treaty of 1868 and the agreement of 1877 effect so as uphold the jurisdiction exercised in this case, would be to reverse in this instance the general policy of the Government towards the Indians, as declared in many statutes and treaties, and recognized in many decisions of this court from the beginning to the present time. To justify such a departure in such a case requires a clear expression of the intention of Congress, and that we have not been able to find.

The clear expression of the opinion of Congress has been given in the passage of the act now in question. It is very probable, we think, that the section of the law now under consideration was enacted in view of the decision of this court in *Ex parte* Crow Dog. When the section was pending in the House of Representatives, Mr. Cutcheon, of Michigan, said:

> Mr. Chairman. I believe it is not necessary for me to say that this amendment is in the direction of the thought of all who desire the advancement and civilization of the Indian tribes. It is recommended very strongly by the Secretary of the Interior in his annual report. I believe we all feel that an Indian,

when he commits a crime, should be recognized as a criminal, and so treated under the laws of the land. I do not believe we shall ever succeed in civilizing the Indian race until we teach them regard for law, and show them that they are not only responsible to the law, but amenable to its penalties.

I would not offer this amendment at the present time, and in connection with this appropriation bill, if I thought there existed the least chance or opportunity of its becoming law in any other way. If I believed it possible that a bill of the Committee on Indian Affairs, upon which, as I understand, a like amendment is intended to be proposed, could be taken up and passed at this session, I would not now submit this proposition. But I believe this is the only opportunity that will be afforded during this Congress for this or similar legislation.

We all remember the case of Crow Dog, who committed the murder of the celebrated chief Spotted Tail. He was arrested, tried by a Federal tribunal, and convicted of the murder, but the case being taken to the Supreme Court of the United States upon habeas corpus, it was there decided that the United States courts had no jurisdiction in any case where one reservation Indian committed a crime upon another, thus Crow Dog went free. He returned to his reservation, feeling, as the Commissioner says, a great deal more important than any of the chiefs of his tribe. The result was that another murder grew out of that; a murder committed by Spotted Tail, jr., upon White Thunder. And so these things must go on unless we adopt proper legislation on the subject.

It is an infamy upon our civilization, a disgrace to this nation, that there should be anywhere within its boundaries a body of people who can, with absolute impunity, commit the crime of murder, there being no tribunal before which they can be brought for

punishment. Under our present law there is no penalty that can be inflicted, except according to the custom of the tribe, which is simply that the "blood avenger"—that is, the next of kin to the person murdered—shall pursue the one who has been guilty of the crime and commit a new murder upon him.

And again:

I will ask the gentleman from California (Mr. Budd) to make a statement in that regard. Now, the Secretary of the Interior, in his last annual rereport, uses the following language:

"I again desire to call attention to the necessity for legislation for the punishment of crimes on the Indian reservations. Since my last report the Supreme Court of the United States decided, in the case of '*Ex parte* Crow Dog,' indicted for murder, that the district court of Dakota was without jurisdiction when the crime was committed on the reservation by one Indian against another. If offenses of this character cannot be tried in the courts of the United States there is no tribunal in which the crime of murder can be punished. Minor offenses may be punished through the agency of the 'court of Indian offenses,' but it will hardly do to leave the punishment of the crime of murder to a tribunal that exists only by the consent of the Indians of the reservation. If the murderer is left to be punished according to the old Indian custom, it becomes the duty of the next of kin to avenge the death of his relative by either killing the murderer or some one of his kinsmen."

That is Indian law—not a very inviting kind of law where one murder is to be punished by the commission of one or more additional murders.

"The laws of the State or Territory wherein the reservation is situated ought to be extended over the reservation, and the Indians should be compelled to

obey such laws and be allowed to claim the protection thereof."

I now yield to the gentleman from California to answer the question of the gentleman from Indiana.

Mr. BUDD. I desire to state to Judge Holman and to the committee, that last year I offered an amendment having in view the same object as this amendment, which allowed an Indian who committed any crime to be punished in the courts of the State or Territory in which the crime was committed. It was passed by this House, without any objection, as an amendment to the Indian appropriation bill. It went to the Senate, and that provision was stricken out. It then went to the committee of conference, and there was an understanding, as was stated on the floor of the House by the gentleman from Louisiana, now in charge of this bill, that at this session of Congress a bill or section of this character should, by the agreement of the conference committee, be enacted or incorporated into the appropriation bill providing that it punish felonies only.

The objection by the Senate committee to my amendment was that it punished misdemeanors as well. It will be found in the record of the last session, on the day when the conference report was concurred in by this House, that the gentleman from Louisiana, in answer to a question from myself, stated that they believed the amendment was a proper one; that it was in the right direction, but that it punished misdemeanors and offenses by one Indian upon another of a minor character that ought not to be so punished, and that it was understood if the same amendment was offered at this session of Congress so as only to punish felonies, it would be acceptable to the committee and be adopted.

I believe Judge Holman was, himself, one of the committee of conference on the part of the House at

that time, and if so, he will remember the transaction to which I now refer. If not, I will refer him to the Record on the day on which the conference report was adopted.

The review of the legislation by Congress which we have attempted to make, shows conclusively, we think, that there has been a radical change in the policy of the Government towards the Indians. In the beginning there were powerful and warlike tribes and bands of Indians which occupied a country vastly larger than that inhabited by the whites, but they have gradually given way before the march of Caucasian civilization until they have been reduced to a comparatively small number now confined within narrow limits in the States and Territories, except those larger tribes or nations which are congregated in the Indian Territory.

With the growth of the United States the relation of the Indian tribes to the Government has changed, so that it is now entirely different from what it was at the time of the adoption of the Constitution, and the enactment of the early laws of Congress on the subject. The effect of this change of policy is to subject Indians to the laws of the United States for the punishment of offenses committed by them while remaining under the supervision, control, and tutelage of the Government upon reservations which have been set apart for them. This change of policy has been inaugurated, not for the injury and oppression of these wards of the nation, but for their protection and advancement in the arts of civilization.

We submit, however, that if the intention of Congress is clear in the enactment of the new law, it is not the prov-

ince of the courts to pass upon the question of policy involved. The policy of such legislation is a question of legislative discretion, and not of judicial cognizance. In the case of *McCullough* vs. *The State of Maryland* (4 Wheaton, 316), Chief Justice Marshall, delivering the opinion of the court, said:

> The Government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any proper means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception.

And again:

> The Constitution of the United States has not left the right to Congress to employ the necessary means for the execution of the powers conferred on the Government to general reasoning. To its enumeration of powers is added that of making all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or any department thereof.

And again:

> It must have been the intention of those who gave these powers to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confining the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution intended to endure for ages to come, and consequently to be adapted to the various

crises of human affairs. To have prescribed the means by which the Government should, in all future time, execute its powers would have been to change entirely the character of the instrument and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen, at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances. If we apply this principle of construction to any of the powers of the Government, we shall find it so pernicious in its operation that we shall be compelled to discard it.

And again:

Whence arises the power to punish in cases not prescribed by the Constitution? All admit that the Government may, legitimately, punish any violation of its laws; and yet, this is not among the enumerated powers of Congress. The right to enforce the observance of law by punishing its infraction might be denied with the more plausibility, because it is expressly given in some cases. Congress is empowered "to provide for the punishment of counterfeiting the securities and current coin of the United States," and "to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations." The several powers of Congress may exist, in a very imperfect state, to be sure, but they may exist, and be carried into execution, although no punishment should be inflicted in cases where the right to punish is not expressly given.

Take, for example, the power "to establish post-offices and post-roads." This power is executed by the single act of making the establishment. But from this has been inferred the power and duty of carrying the mail along the post-road from one post-office to another. And, from this implied power, has again been inferred the right to punish those who steal letters from the post-office or rob the mail. It may be said, with some plausibility, that the right to carry the mail and to punish those who rob it is not indispensably necessary to the establishment of a post-office and post-road. This right is, indeed, essential to the beneficial exercise of the power, but not indispensably necessary to its existence. So, of the punishment of the crimes of stealing or falsifying a record or process of a court of the United States, or of perjury in such court. To punish these offenses is certainly conducive to the due administration of justice. But courts may exist, and may decide the causes brought before them, though such crimes escape punishment.

The baneful influence of this narrow construction on all the operations of the Government, and the absolute impracticability of maintaining it without rendering the Government incompetent to its great objects, might be illustrated by numerous examples drawn from the Constitution and from our laws. The good sense of the public has pronounced, without hesitation, that the power of punishment appertains to sovereignty, and may be exercised whenever the sovereign has a right to act, as incidental to his constitutional powers. It is a means for carrying into execution all sovereign powers, and may be used, although not indispensably necessary. It is a right incidental to the power, and conducive to its beneficial exercise.

We submit that there is ample authority in the eighth section of article 1, and in the general provision authorizing Congress to pass all laws that may be necessary to carry into effect the other provisions of the Constitution, for the passage of this law. We submit, also, that there is no other provision of the Constitution that prohibits the exercise of such power by Congress. There is nothing in the Fourteenth Amendment which conflicts with the view for which we contend. Though Indians may not be citizens, and subject to the political jurisdiction of the United States, they are subject to its laws. A person may be subject to the laws of a country, and yet not subject to its jurisdiction, within the purview of the Fourteenth Amendment. Children of a foreign consul born in the United States are subject to its criminal laws, although not subject to its political jurisdiction.

In conclusion, upon this general proposition we submit that the validity of the section of the law now under consideration depends upon how broad a signification may be given to the word "commerce." We have seen that it means not only trade but *intercourse* with Indian tribes and individual Indians. Our contention is that Congress may regulate the intercourse in whatever way it may deem wise and prudent. Congress has provided for the establishment of schools upon the Indian reservations; these schools are maintained at the expense of the Government. Will it be seriously contended that an Indian should be permitted to enter one of these Indian schools and murder the Indian teacher, or one of the Indian children, without being amenable to any law, except mere tribal custom, which permits the escape of the mur-

derer upon the payment of a small stipend to the family of the victim? As a matter of fact such a thing was possible before the passage of this law. Although fed and clothed by the Government, Indians, before the passage of this law, could murder each other on the reservations with impunity.

If we are asked in what respect the commission of a crime by an Indian upon an Indian can relate to the question of intercourse with an Indian tribe, we deem it sufficient answer to say that if we have to maintain intercourse with the Indians, it is necessary and proper to provide that they shall not be permitted to destroy each other. If they are permitted to murder each other, it is certainly an interference with intercourse; because the number with whom intercourse will be held is thereby diminished. It is an historical fact, of which the court will take notice, that the present policy of the National Government is to protect the Indians, to educate their children, and to bring them as rapidly as possible within the pale of civilization and laws of the United States. Hence, for a number of years past, large appropriations have annually been made for the maintenance of Indian schools. Upon several of the Indian reservations teachers are employed, and United States military officers are detailed for the organization and conduct of these schools. Thus the children of Indians are educated, and an attempt is being made under the present policy of the Government to bring the remaining Indians under the control of the laws of the United States.

The legislation we are now considering has been adopted,

not from a spirit of enmity towards the Indians, nor from a desire to inflict upon them any unusual punishment, but with a view to bring them into relations with the white people, among whom they are to live in the years to come. Now suppose that upon this Hoopa Valley Reservation, Humboldt County, State of California, an Indian school is established by act of Congress, or by direction of the Interior Department, that an officer of the Army is detailed as superintendent, and Indian teachers are engaged. If the construction contended for on the other side be correct, an Indian may enter the school and murder the Indian teacher or the Indian children, and yet his offense would not be considered as an interference with our intercourse with the Indians on that reservation.

Again, the public interests may require that an interpreter of the Indian race should be employed by the Government for the purpose of interpreting between the tribe and the military officer who may be there as superintendent. If that Indian interpreter should be murdered by Kagama, or some other Indian, would it not be an interference with our intercourse with that tribe of Indians? If an Indian who has become civilized and has obtained from the Government a license to trade with the Indians, should go on the Hoopa Valley Reservation for the purpose of trading, and should be there murdered by another Indian, would it not be an interference with the intercourse between the Government and the tribe of Indians located on that reservation? It is clear, we think, that the State of California could not exercise jurisdiction of the offense for which the prisoners have been indicted.

Section 2145 of the Revised Statutes in express terms extends the criminal laws of the United States over the Indian reservations. (See, also, *McKinney's Case*, 1 West Coast Reporter, 407.)

The crucial test in this matter is to inquire whether the statute under consideration is pertinent to the subject-matter of intercourse with the Indian tribes which Congress has power to regulate. Does it relate to our intercourse with Indians? If so, Congress has power to provide that Indians should be punished for murdering each other.

It is very clear that the setting apart of this reservation took it out of the State jurisdiction and placed it, as we have seen, under the general jurisdiction of the United States. Here is the proclamation designating it:

> EXECUTIVE MANSION, *June* 23, 1876.
>
> It is hereby ordered that the south and west boundaries and that portion of the north boundary west of Trinity River surveyed, in 1875, by C. T. Bissel, and the courses and distances of the east boundary, and that portion of the north boundary east of Trinity River reported but not surveyed by him, viz: "Beginning at the southeast corner of the reservation at a post set in mound of rocks marked 'H. V. R. No. 3;' thence south 17½ degrees west 905.15 chains, to southeast corner of reservation; thence south 72½ degrees west 480 chains, to the mouth of Trinity River," be, and hereby are, declared to be the exterior boundaries of Hoopa Valley Indian Reservation, and the land embraced therein, an area of 89,572.43 acres, be, and hereby is, withdrawn from public sale, and set apart for Indian purposes, as one

of the Indian reservations authorized to be set apart, in California, by act of Congress approved April 8, 1864. (13 Stat. L., p. 39.)

U. S. GRANT.

The sixth amendment to the Constitution, guaranteeing a speedy and public trial to the accused by an impartial jury of the State and district wherein the crime shall have been committed, &c., does not militate against our position; or, in other words, this indictment and proceedings under it do not violate this amendment to the Constitution. It has been several times decided by this court that crimes committed against the laws of the United States out of the limits of a State are not local, but may be tried at such places as Congress shall designate by law (*United States* vs. *Dawson et al.*, 15 How., 467; *United States* vs. *Jackalow*, 1 Bl., 484). The reasoning in *United States* vs. *Rogers* (4 How., 572), concedes the power to Congress that is claimed under this indictment; and so, too, does the *Cherokee Tobacco* (11 Wall., 619). Because Congress has not heretofore gone thus far is no reason it could not do so. It is purely a question of policy, of which Congress is the judge, and, except the three cases already referred to, and one of them merely doubting, all the decisions unite in saying the power exists in Congress. To use the language of Dr. Wharton (American Law, sec. 26) on this subject: "It (the United States Government) can take from them their reservations; it can move them to another Territory; it can, if it chooses, impose upon them its municipal laws; it has not in many relations chosen to do so, but its power nevertheless remains

and is unchecked by any Constitutional restraint." We confidently submit these questions should be so answered as to sustain the constitutionality of the act mentioned.

Respectfully submitted.

A. H. GARLAND,
Attorney-General.
JOHN GOODE,
Solicitor-General.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1885.

No. 1246.

THE UNITED STATES, PLAINTIFF,

vs.

KAGAMA, ALIAS "PACTAH BILLY," AN INDIAN, AND MAHAWAHA, ALIAS "BEN," AN INDIAN.

On a Certificate of Division of Opinion Between the Judges of the Circuit Court of the United States for the District of California.

BRIEF FOR THE DEFENDANTS.

JOSEPH D. REDDING,
Attorney for Defendants.

JUDD & DETWEILER, PRINTERS.

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On a Certificate of Division of Opinion Between the Judges of the Circuit Court of the United States for the District of California.

BRIEF FOR THE DEFENDANTS.

The defendants were indicted on the second Monday of August, 1885, by the grand jury of the United States of America for the felonious, willful, and malicious murder of one Iyouse, *alias* Ike, an Indian, at the county of Humboldt, in the State of California, within the limits of the Hoopa Valley Indian reservation. The indictment was certified to the circuit court of the United States for the district of California for trial. The defendants filed a demurrer to the in-

dictment on October 26, and in said demurrer, among other things, stated as follows:

"And the defendants further saith that this honorable circuit court hath no jurisdiction of themselves and that said honorable court is without jurisdictional authority to proceed against the said defendants. Wherefore they pray judgment of the court here and that they may be dismissed and discharged of the said indictment.

"JOSEPH D. REDDING,
"*Att'y for Def'ts.*"

The case was heard on the demurrer to the indictment. Whereupon, on the 10th of December, 1885, the following certificate of division of opinion was filed by Hon. Lorenzo Sawyer, circuit judge, and Hon. George M. Sabin, district judge:

"CERTIFICATE, &C.

"The said certificate, order, indictment, and demurrer are hereby made a part of this certificate, and ordered to be certified by the clerk, and annexed to this certificate as a part of the record of this case, on certificate of opposition of opinion.

"The case was heard on the indictment and the demurrer thereto, and upon the hearing of said case at the present term of the court upon said papers and record there occurred as questions arising on the record:

"1. Whether it is within the constitutional power of Congress to pass section 9 of the act of Congress, approved March 3, 1885, entitled 'An act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with the various Indian tribes, for the year ending June 30, 1886, and for other purposes," found in statutes of second session, 1884–'5, page 385, providing that "after the passage of this act all Indians committing against the person of another Indian the crime of 'murder,' within the boundaries of any State of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same

penalties as are all other persons committing the crime of murder within the exclusive jurisdiction of the United States.'

"2. Whether said section 9, so far as it makes crimes committed by one Indian upon another Indian, upon and within an Indian reservation situate wholly within the boundaries of a State of the Union, an offense against the laws of the United States, triable and punishable in and by the courts of the United States, is constitutional or is within the constitutional power of Congress to pass.

"3. Whether the provisions of said section 9, so making it a crime for one Indian to commit murder upon another Indian upon an Indian reservation situated wholly within the limits of a State of the Union, and making such Indian so committing the crime of murder within and upon such Indian reservation 'subject to the same laws' and subject to be 'tried in the same courts and in the same manner, and subject to the same penalties as are all other persons' committing the crime of murder 'within the exclusive jurisdiction of the United States," is a constitutional and valid law of the United States.

"4. Whether the facts alleged and charged in the indictment set out in the record constitute a crime or offense against or under any valid act of Congress or law of the United States.

"5. Whether the circuit court of the United States has authority or jurisdiction to try the offense or crime charged in the indictment, and upon conviction to adjudge against, and inflict upon, the defendants the penalties provided for in said section 9 of said act, or any other statute of the United States.

"6. Whether the courts of the United States have jurisdiction or authority to try and punish an Indian belonging to an Indian tribe for committing the crime of murder upon another Indian belonging to the same Indian tribe, both sustaining the usual tribal relations, said crime having been committed upon an Indian reservation made and set apart for the use of the Indian tribe to which said Indians both belong.

"Upon which several questions, and upon each of them, the opinions of the judges were opposed.

"Wherefore, on the motion of Henry C. Dibble, Esq., assistant United States attorney for said district on behalf of

the United States, that the several points upon which the disagreement has happened may during the term be stated, under the direction of the judges, and certified, under the seal of the court, to the Supreme Court of the United States to be finally decided:

"It is ordered that the foregoing statement of the record and facts upon which the case was heard, and of the points of difference as to the law arising thereon, which is made under the direction of the judges, be entered of record and be certified accordingly, at the request of said counsel and in pursuance of the law in such case made and provided.

"(Signed) LORENZO SAWYER,
Circuit Judge.

"(Signed) GEORGE M. SABIN,
Dist. Judge."

(Endorsed:) Filed and entered December 10, 1885. L. S. B. Sawyer, clerk.

This indictment is drawn under and by virtue of the act of Congress approved March 3, 1885, and entitled "An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the year ending June 30, 1886, and for other purposes." This act is found in the second session of the 48th Congress, page 385. The particular part of said act which empowers, if at all, this honorable Court to try these defendants is section nine, which reads as follows:

"That immediately upon and after the date of the passage of this act all Indians committing against the person or property of another Indian, or any other person, any of the following crimes, namely, *murder*, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny, within any of the Territories of the United States, and either within or without an Indian reservation, shall be subject therefor to the laws of such Territory relating to such crimes, and shall be tried therefor in the same court and in the same manner,

and shall be subject to the same penalties, as are all other persons charged with the commission of said crimes, respectively, and the said courts are hereby given jurisdiction in all such cases, *and all such Indians committing any of the above crimes against the person* or property of another Indian, or other person, within the boundaries of any State of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties, as are all other persons (charged with) committing any of the above crimes within the exclusive jurisdiction of the United States. Approved March 3d, 1885."

Preliminary Statement as to Extent of Jurisdiction Contemplated in This Act.

The object of this act is to bring all the Indians in the Territories of the United States, either within or without the reservation, within the jurisdiction of the Territorial courts, as are all other persons, and of the Indians on reservations lying within the boundaries of the States within the jurisdiction of the Federal courts, in the same manner as are all other persons charged with committing any of the above crimes within the exclusive jurisdiction of the United States. The honorable the Attorney General takes the position that this act of March 3, 1885, is not intended to include the Indian Territory. We submit that the object of this act is to make all of the Indians in all parts of the United States and Territories amenable to the same laws as are other persons in committing offenses defined in the act, and that it is the intention of the act to include the *Indian Territory* as well as other States and Territories. The act refers to any Territory of the United States, either within or without the reservation, which means that the Territorial courts shall have jurisdiction of the Indian, no matter what part

of the Territory he is in, whether on his own allotted ground or not. An act of Congress was passed June 6, 1883, entitled "An act to provide for holding a term of the district court of the United States at Wichita, Kansas, and for other purposes," found in 22d Statutes at Large, page 400. This act, in substance, stretches the jurisdiction of the United States district courts of Kansas and Texas over portions of the Indian Territory. Sections 1839 and 1840 of the Revised Statutes provide that "the criminal laws of the United States shall not impair the rights of person or property pertaining to the Indians in a Territory so long as such rights remain unextinguished by treaty, and that all such Territory shall be excepted out of the boundaries and constitute no part of any Territory now or hereafter organized." This act of March 3, 1885, either affects every reservation within all the Territories of the United States, and affects all of the Indians within the confines of our Government, and does away with the restriction in the act of June 6, 1883, and sections 1839 and 1840 of the Revised Statutes, or has no effect at all and is unconstitutional and void. This honorable Court in the case of the United States *vs.* Richard S. Coxe, 18 Howard, 100, December term, 1855, has decided that the Cherokee Nation, then as now occupying a portion of the Indian Territory, is to all intents and purposes a Territory of the United States. Page 103 the Court says:

"A question has been suggested whether the Cherokee people should be considered or treated as a foreign State or Territory. The fact that they are under the Constitution of the Union, and subject to acts of Congress regulating trade, is a sufficient answer to the suggestion. They are not only within our jurisdiction, but the faith of the nation is pledged for their protection. In some respects they bear the same

relation to the Federal Government as a Territory did in its second grade of government under the ordinance of 1787. Such Territory passed its own laws, subject to the approval of Congress, and its inhabitants were subject to the Constitution and acts of Congress. The principal difference consists in the fact that the Cherokees enact their own laws, under the restriction stated, appoint their own officers, and pay their own expenses. This, however, is no reason why the laws and proceedings of the Cherokee territory, so far as relates to rights claimed under them, should not be placed upon the same footing as other territories in the Union. It is not a foreign but a domestic territory—a territory which originated under our Constitution and laws."

I also refer the Court to *ex parte* Crow Dog, 109 U. S. 559 showing to what extent the criminal laws of the United States can be stretched over an Indian reservation within the confines of an organized Territory, and also as to how the jurisdiction of the United States can be stretched over a reservation set apart for the Indians, and not within the limits of an organized Territory of the United States.

POWER OF CONGRESS TO DEAL WITH THE INDIAN TRIBES UNDER THE CONSTITUTION.

"The power of Congress to deal with the Indian tribes is found in article 1, section 8, clause 3, of the Constitution: 'The Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.' The only other reference to the Indian found in the Constitution is in article 1, section 3, and in the fourteenth amendment (which embraces all that is contained in article 1, section 3), and which reads: 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside.' * * * 'Representation shall be apportioned among the several States according to their respective number, counting the whole number of persons in each State, excluding Indians not taxed.'"

There is also the general enabling section of the Constitution, section 18, article 1, paragraph 8, which reads:

"Congress shall have power to make all laws necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States."

The above are the only references to the Indians found in the Constitution, and the right of Congress to deal with them must depend on those provisions.

WHAT ARE INDIAN RESERVATIONS?

Indian reservations are the tracts of land set apart by the United States Government for the exclusive use and occupancy of particular Indian tribes. They can be made by treaty or Executive order. The mode of establishing a reservation makes no difference.

U. S. *vs.* William Martin, 8 Sawyer, 473.

U. S. *vs.* Crow Dog.

ARGUMENT.

I.

The act of March 3, 1885, is unconstitutional and void. (*a*) The power of Congress to regulate commerce with the Indian tribes does not authorize Congress to enact criminal laws regulating the Indians as to offenses committed among themselves on foreign reservations. (*b*) Up to March 3, 1885, Congress has always recognized and held inviolate tribal rights and the social system of the Indian tribes on their reservations. (*c*) In all acts of Congress prior to that date (with one or two exceptions which, when brought to

the attention of this Court, have been declared unconstitutional), and in all treaties made with the Indians, and in the Revised Statutes, a clause has always appeared to the effect: "Provided, That nothing herein shall be deemed as extending the jurisdiction of the United States to any crime committed by one Indian upon another."

There are three features in this indictment which are peculiar. First. The crime is alleged to have been committed by Indians on a fellow Indian. Second. The act is set forth as having been committed upon an Indian reservation. Third. The reservation is set forth as being within the limits of a State, namely, the State of California. In the certificate of division the sixth section reads: "Whether the courts of the United States have jurisdiction or authority to try and punish an Indian belonging to an Indian tribe for committing the crime of murder upon another Indian belonging to the same Indian tribe, both sustaining the usual tribal relations, said crime having been committed upon an Indian reservation made and set apart for the use of the Indian tribe to which said Indians both belong. This last section permits the argument to extend to the fundamental principles upon which are based all dealings of our Government with Indian tribes, and without the sixth section the argument would necessarily be limited to the power of Congress to control offenses committed by Indians, one upon the other, on a reservation *within a State.*

The policy of our Government in relation to the Indians since the adoption of the Constitution has created for them a status which is anomalous and peculiar. This status has not been changed nor has it been construed to be in any wise

different than when defined by Chief Justice Marshall in the Cherokee case. (Cherokee Nation against Georgia Supreme Court, 1831, 5 Peters). The reservation system is an outgrowth of the position taken by our Government and by the courts in construing the Constitution of the United States, which declares that "Congress shall have power to regulate commerce with foreign nations and among the several States and with the Indian tribes." The Indian tribes have been defined to be semi-independent, political, and social communities." (Supreme Court, 1831; Cherokee Nation against Georgia, 5 Peters.)

The Indian tribes are not foreign citizens or subjects, and cannot maintain a suit in the United States courts. (Karrahoo, 1 Dillon, 344, 1870.) The 14th amendment of the Constitution of the United States, which reads that "all persons born or naturalized within the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside," does not apply to the Indian tribes on reservations. (State of Nevada *vs.* McKinney, 1 Westcoast Reporter, 413; U. S. *vs.* Bailey, 1 McLean, 234.)

The decisions adverse to the citizenship of Indians are founded on the peculiarities of tribal condition, and all rest upon the fact that children born of members of Indian tribes and within the United States are not born subject to the jurisdiction thereof. (U. S. *vs.* Osborn, 6 Sawyer, 406, 1881.)

On March 3, 1817, Congress passed an act providing "that if any Indian or other person or persons shall, within the United States or within any town, district, or territory belonging to any nation or nations, tribe or tribes, of Indians, commit any crime, offense, or misdemeanor which, if com-

mitted in any place or district of country under the sole and exclusive jurisdiction of the United States, would, by the laws of the United States, be punished with death or any other punishment, every such offender, on being thereof convicted, shall suffer the like punishment as is provided by the laws of the United States for the like offense if committed within any place or district of country under the sole and exclusive jurisdiction of the United States."

This act was declared void and unconstitutional in the case of United States *vs.* Bailey, 1 McLean, 234.

This act is the nearest approach to the act under consideration in the case at bar that can be found, and the entire decision of this honorable Court in that case is directly pertinent. In this decision the Court declares that "the powers of the Federal Government are limited. It possesses no powers but such as have been delegated. Congress has power to regulate commerce among the Indian tribes, which affords a wide scope for legislation. Congress has a right to select the means which have a direct relation to the object in the regulation of commerce with the Indians. But Congress cannot, under this investure of power, exercise a general jurisdiction over an Indian territory within a State. Congress cannot punish for an offense committed within an Indian territory which in any wise affects the commerce of the Indians."

Page 240 the Court says:

"They have power to regulate commerce with the Indian tribes; consequently they may provide by law in what manner this intercourse shall be carried on, and impose penal sanctions for a violation of the law. But may they by reason of this special power assume a general jurisdiction and

prescribe for the punishment of all offenses? If this may be done under the power to regulate commerce with the Indian tribes, why may it not be done in all other cases, where a limited power is exercised by Congress to effectuate a special object?

"Congress has power to regulate commerce among the several States; and if the same power, given in the same words, in relation to the Indians may be exercised, as contended, why may not Congress legislate on crimes for the States generally?

"That Congress has not this general power is a proposition too clear for demonstration. The thing itself is so palpable that it is susceptible of no illustration. Who would attempt, after reading the Federal Constitution, to prove by any course of argument that this is a limited Government? The very instrument that gives existence to the Government imposes the limitations.

"And is it not equally clear that where a special jurisdiction has been given to Congress a general one cannot be exercised? Is not the jurisdiction under consideration special? Does it not relate exclusively to the regulation of commerce with the Indian tribes? And does not the act in question provide for the punishment of a crime committed by one citizen upon another *wholly disconnected* from any intercourse with the Indians? If this be a constitutional provision the jurisdiction by Congress for the punishment of offenses in the Indian country, within the boundaries of any State, is without limit.

"Believing that in the passage of this provision of the act of 1817 Congress has transcended its constitutional powers, I feel bound to say so, and consider this part of the act as having no force or effect."

In all the dealings of our Government with the Indians they have always been carried on either by open warfare or by the commercial relation, for in the act of 1817 above quoted there occurs a clause to the effect, "Provided, that this act shall not refer to offenses committed by one Indian against another." Why is it that this clause has always existed in every treaty and in every act of Congress in relation

to the Indians? Is it not because the Constitution recognizes the independent social system of the Indian tribes, and does it lie in the power of Congress to obliterate this peculiar status, to destroy the reservation lines, and to declare that the Indians on or off reservations shall be amenable like all other persons committing acts which are offenses recognized by the citizens of the United States, and which may or may not be offenses within the social system of the Indians and within the limits of their tribes and reservations? The honorable Attorney General has traced the history of the Indian intercourse laws which have been adopted since the organization of the Government and has endeavored to prove that Congress has at all times exercised the power of enacting criminal laws for the Indian country. We beg to differ directly with this conclusion. The first and second acts of Congress regulating trade and intercourse with Indian tribes, namely, the act approved July 22, 1790, vol. 1, p. 137, Statutes at Large, and the act of March 3, 1799, same volume, 743, have no reference to criminal legislation, except as to crimes committed by citizens of the United States against Indians. The third intercourse act, approved March 30, 1802, vol. 2, of the Statutes at Large, page 139, contains a clause by which the President may demand reparation of a tribe of Indians for offenses committed by them out of their own country—that is to say, it refers exclusively to Indians "who shall go over or cross said boundary lines into any State or Territory." This act of 1802 remained in force until 1834. The act of 1817, above referred to, was passed in the interim and declared unconstitutional. The facts in the Bailey case were different from the case at bar, the offense having

been committed by a white man within an Indian reservation. But the line of reasoning by which this Court declared said act unconstitutional applies directly to the facts in the case at bar. The act of 1834 contained a provision that the criminal laws should not extend to cases where the crime was committed by one Indian upon another. This clause was incorporated in the Revised Statutes and remained in force until the act of March 3, 1885. This clause has been the outgrowth of the position given to the Indians under the Constitution and certified to and maintained by this Court and the inferior courts of the United States. The very idea of the reservation system is predicated upon the theory that the Indians are not citizens, are not foreign subjects, are not subject to the jurisdiction of the United States, except where a question of commercial intercourse is an element in the offense committed.

Elk v. Wilkins 112 U.S. 102 and

The latest expression of this Court in regard to the status the Indians occupy is found in the case of *Ex parte* Crow Dog, 109 U. S., 556. Mr. Justice Matthews delivered the opinion of the Court. In that case the defendant had killed a member of his own tribe, which tribe had entered into a treaty with the United States. Among the provisions of that treaty occurred the clause:

> "And Congress shall by appropriate legislation secure to them an orderly government. They shall be subject to the laws of the United States, and each individual shall be protected in his rights of property, person, and life."

Here is an express stipulation on the part of the Indian tribes declaring themselves amenable to the laws of the

United States; yet the Court declares that "they were, nevertheless, to be subject to the laws of the United States, not in the sense of citizens, but as they had always been, as wards subject to a guardian; not as individuals, constituted members of the political community with a voice in the selection of representatives and the framing of the laws, but as a dependent community who were in a state of pupilage, advancing from the condition of a savage tribe to that of a people who, through the discipline of labor and by education, *it was hoped* might become a self-supporting, self-governed society." Again, page 571:

"It tries them, not by their peers, nor by the customs of their people, nor the law of the land, but by superiors of a different race, according to the law of a social state of which they have an imperfect conception, and which is opposed to the traditions of their history, to the habits of their lives, to the strongest prejudices of their savage nature; one which measures the red man's revenge by the maxims of the white man's morality. It is a case, too, of first impression, so far as we are advised; for if the question has been mooted heretofore in any of the courts of the United States the jurisdiction has never before been practically asserted as in the present instance. The provisions now contained in paragraphs 2145 and 2146 of the Revised Statutes were first enacted in paragraph 25 of the Indian intercourse act of 1834, 4 Stat., 733. Prior to that, by the act of 1796, 1 Stat., 479, and the act of 1802, 2 Stat., 139, offenses committed by Indians against white persons and by white persons against Indians were specifically enumerated and defined, and those by Indians against each other were left to be dealt with by each tribe for itself, according to its local customs. *The policy of the Government in that respect has been uniform.* As was said by Mr. Justice Miller, delivering the opinion of the Court in United States *vs.* Joseph, 94 U. S., 614, 617:

"'The tribes for whom the act of 1834 was made were those semi-independent tribes whom our Government has always recognized as exempt from our laws, whether within or without the limits of an organized State or Territory, and,

in regard to their domestic government, left to their own rules and traditions, in whom we have recognized the capacity to make treaties, and with whom the governments, State and national, deal, with a few exceptions only, in their national or tribal character, and not as individuals.'

"To give the clauses in the treaty of 1868 and the agreement of 1877 effect, so as to uphold the jurisdiction exercised in this case, would be to reverse in this instance the general policy of the Government towards the Indians as declared in many statutes and treaties, and recognized in many decisions of this Court from the beginning to the present time. To justify such a departure in such a case requires a clear expression of the intention of Congress, and that we have not been able to find."

We beg to suggest that "to justify such a departure" not only requires a fair expression of the intention of Congress, but also requires a clear expression of authority in the Constitution.

The Government has not dealt with the Indians for the purpose of educating them, or on the theory that they are wards of the Government, and that the reservations are, as it were, national nurseries, however elevated and noble such a theory would be to our Government; but it has dealt with them on the single basis of regulating commercial intercourse with them, and of recognizing and maintaining for them their independent and peculiar status. It is true that the Indian tribes, by the force of our superiority, have been pressed further away from their original domain, and have been crowded in more confined limits; but the letter of the Constitution has always been obeyed, and the Indians have been placed on the several reservations that they now occupy to-day either from a bargain or as the result of open hostility with our Government.

This act of March 3, 1885, makes the Indians amenable for acts which under our laws are defined as arson, burglary, larceny, murder, etc. If an Indian sees fit to burn his neighbor's wigwam, what question of commercial intercourse there arises? None whatever.

If Congress has authority to make them amenable for the offenses defined in this act, it can include all the offenses in the calendar. Yet if an Indian take upon himself several wives, or see fit to put rings through his daughter's nose as a religious ceremony, what question of commercial intercourse would there arise? None whatever. Congress has been given no eyes with which to see these things. Under the indictment as drawn no element of commerce enters in it. A question of commerce can possibly enter into the commission of the act of murder in six different ways, in which either an Indian or a reservation is affected:

1st, an Indian kills a white man on a reservation; 2d, an Indian kills a white man off a reservation; 3d, a white man kills an Indian on a reservation; 4th, a white man kills an Indian off a reservation; 5th, an Indian kills an Indian off a reservation; 6th, a white man kills a white man on a reservation.

But if an Indian kills an Indian on a reservation there is no connecting link betwen the Government and the Indian in such an act which, under the Constitution of the United States as it now stands, would give the Federal ~~Government~~ Courts jurisdiction.

The act of March 3, 1871, which provided that "no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent

nation, tribe, or power, with whom the United States may contract by treaty, but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3d, 1871, shall be hereby invalidated or impaired," in no wise affects the case at bar, as the Hoopa reservation was established in 1864, and also for the reason, as we submit, that no act of Congress, under the Constitution as it now stands, can change the status of the Indian tribes. In U. S. *vs.* Holliday, 3 Wallace, 407, this Court sustained the constitutionality of an act of Congress making it penal to sell spirituous liquor to an Indian. In order to sell liquor to an Indian a commercial relation must arise; consequently Congress has the power to control it and to say that no liquor shall be sold. Congress can cut off all communication with the Indians. But suppose that one Indian manufactured a liquor of his own on his reservation and disposed of it among the members of his tribe, would Congress have any right to interfere and prevent the commission of such an act? We submit that it would not. This illustration, we believe, shows the line clearly which limits the power of Congress to deal with the Indans in matters of this kind.

II.

Congress, under its investure of power to regulate commerce among the Indian tribes, cannot exercise a *general* and exclusive jurisdiction over an Indian reservation within a State: (*a.*) Congress cannot punish for an offense committed on an Indian reservation within a State which in no wise affects the commerce between the Indians and the United States Government. (*b.*) An Indian reservation within a State is not a territory of the United States over

which the Federal Government has exclusive jurisdiction, as in the case of United States arsenals, &c., unless there has been a cession of jurisdiction by the State to the Federal Government.

There is nothing in the act of admission of the State of California or in any subsequent acts which cede to it the exclusive jurisdiction of the Hoopa Valley reservation. Undoubtedly Congress has exclusive control of the Indians on a reservation in a State, so far as commercial intercourse is concerned. This jurisdiction refers exclusively to the commercial relation; but if Congress, by this act of March 3, 1885, takes the position that the status of the Indians does not preclude our Government from exercising complete criminal jurisdiction over them it then follows that the Indians are amenable to the criminal laws of the State within which the reservation lies. If a white man murdered a white man upon the Hoopa Valley reservation he would be amenable to the laws of the State of California. In other words, the jurisdiction of the United States arises from the fact that the question of commerce enters into the commission of the offense, and which must clearly appear; and if no question of commercial intercourse is apparent in the offense when committed on a reservation within a State the offense, if punishable at all, must be so under the laws of the State in which it was committed. (U. S. *vs.* Holliday, 3 Wall, 407; U. S. *vs.* Cisna, 1 McLean, 254; U. S. *vs.* Bailey, *supra;* State of Nevada *vs.* McKinney, 1 West Coast Reporter, 413; U. S. *vs.* Ward, 1 Woolworth, 17; U. S. *vs.* Yellow Son, 1 Dillon, 345; *Ex parte* Reynolds, 18 Albany Law Journal, p. 8.)

We respectfully submit that section 9 of the act of March 3, 1885, is unconstitutional and void, and that the circuit court for the district of California is without jurisdiction or authority with which to try these defendants, and that they should be discharged.

JOSEPH D. REDDING,
Attorney for Defendants.

Office Supreme Court U. S.
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JAMES H. McKENNEY,
CLERK.

ADDENDUM.

III.

In the Crow Dog case this Court declared that in order to change the policy adopted by the Government toward the Indians from the commencement and maintained up to the present, and in order to change the status of the Indians, a clear intention on the part of Congress to do so would have to be apparent.

We submit most strenuously that this act of March 3, 1885, declares no such intention. The act is an act to provide for the current expenses of the Indian Department and for carrying out *treaty stipulations* with the Indians, and for other purposes. The body of the act is for the very opposite purpose of fulfilling treaties and bargains with the Indians, and for continuing them in their tribal independence. The last clause of the act is an effort to make them amenable *like all other* persons for the commission of certain crimes among themselves.

This is utterly inconsistent and irreconcilable with the title and body of the act.

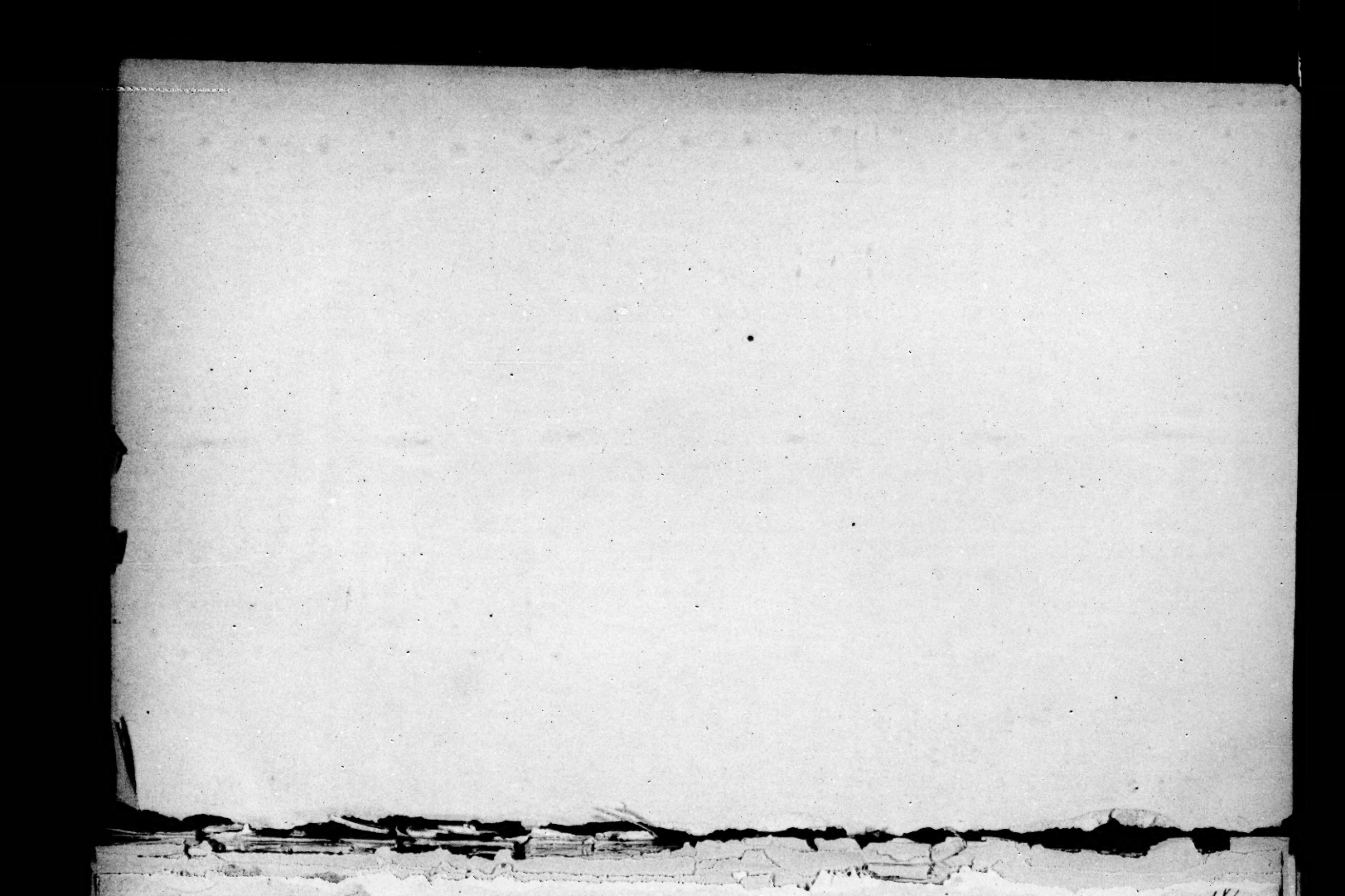
If the Indians are henceforth to be regarded and ruled by our laws the same *as all other persons*, then all idea of treaty stipulations, tribal rights, and reservations, must be wiped out, obliterated, and done for, forever.

Tl is can only be accomplished by a direct and sweeping act of Congress declaring the single avowed intention of so doing. Any other act, such as the one under consideration,

which in its title and in its principal provisions is passed for the purpose of "fulfilling treaties," etc., cannot accomplish this object by tacking on at the end a clause declaring them amenable to our laws for offences committed among themselves, and such an act is *not* a clear declaration of intention on the part of Congress.

We have argued in the body of our brief that it is not within the constitutional power of Congress to change the status of the Indian tribes. This we submit is correct, Congress can refuse longer to recognize the tribes and thus end the matter, but it cannot seek to interfere with and change the social system of the tribes, and in the same breath proceed to carry out treaties and negotiations with them.

Section 9 of the act of March 3, 1885, is without effect and void.

Respectfully,

JOSEPH D. REDDING.